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Title II of the Americans with Disabilities Act

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Introduction: On July 26, 1990, the President signed the American with Disabilities Act ("ADA"), a landmark statute which some disability advocates have characterized as their "Magna Carta". The ADA will have far-reaching effects on the way in which many entities --private and public-- must operate. As governmental entities, your agencies are subject to the mandates of the ADA. Since Massachusetts already has some of the strongest laws protecting the rights of people with disabilities, in many respects enactment of the ADA will not significantly alter the obligations under which your organization already functions. In other respects, the ADA might require you to modify some of your agency's practices and policies. The following question and answer format presents the essential features and requirements of the statute, and how they may impact you.

If you have any questions that are not addressed below, please contact the Disability Rights Project within the Civil Rights Division of the Office of the Attorney General (617) 727-2200 (v) (617) 727-4765(tty). We will try to respond or refer you to other resources. We hope this information will assist everyone understand their obligations under the ADA.

What does the ADA cover?

The ADA consists of five different titles or sections, each of which covers a different area or entity. Title II, which covers "public entities", is the relevant title for virtually all of your organizations. "Public entity" is defined as "any state or local government; any department, agency, special purpose district or other instrumentality of a state ..or local government."

The other titles cover: employment (Title I), public accommodations (Title III), and telecommunications (Title IV).

What does Title II of the ADA provide?

Title II states:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Many of you who have received federal funds in the past are familiar with the prior major federal statute prohibiting discrimination against persons with disabilities, Section 504 of the Rehabilitation Act of 1973, ("§504"). You might recognize the Title II language as being virtually identical to that of §504. (You might also recognize the language as being almost identical to the text of Amendment Article 114 to the Massachusetts Constitution, which became effective on December 10, 1981). In enacting the ADA, Congress extended the non-discrimination provisions of §504 (which prohibited programs that received federal financial assistance from discriminating against persons with disabilities), to <u>all</u> public entities, regardless of whether they receive federal financial assistance.

Who is covered by the phrase "qualified individual with a disability"?

The standard for who is protected by the ADA was purposely drafted to be a very broad and inclusive one. "Individual with a disability" is defined as someone who a) has a physical or mental impairment that limits one or more major life activities (such as performing manual tasks, walking, seeing, hearing, speaking or working); or b) has a history of such an impairment; or c) is regarded or perceived as having such an impairment, (even if the person does not have an impairment).

A person is a <u>qualified</u> individual with a disability if that individual, with or without reasonable modification to the rules, policies, or practices of the public entity, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities of the entity. Other reasonable modifications include the removal of architectural, communication or transportation barriers, or the provision of auxiliary aids and services. As law enforcement agencies that provide services to all citizens within your particular jurisdiction, essentially all of your citizens with disabilities will meet the eligibility requirements for your services.

When do the requirements of the ADA take effect?

All of the non-discrimination provisions of Title II, including the employment provisions, were effective as of January 26, 1992.

There are two additional points which relate to the question of implementation dates:

First, the Title II regulations, as they were originally proposed, provided that the employment provisions of Title II were not effective until July 26, 1992, the effective date of Title I of the ADA. After a strong negative response to that proposal, the Department of Justice changed the implementation date of the Title II employment provisions to January 26, 1992. Some of the early written materials, which were based upon the proposed regulations, mistakenly stated that July 26, 1992, was the effective date.

Second, as is discussed below, the provisions that address program accessibility provide two different effective dates, depending upon whether the facility is an existing structure or is newly constructed or altered. Facilities constructed after January 26, 1992 must be physically accessible. Structural changes to make existing buildings accessible must be completed within three years of January 26, 1992.

What are the non-discrimination in employment provisions of Title II?

Similar to the provisions of Mass. G.L. ch. 151B, Title II of the ADA prohibits employment discrimination against qualified individuals with disabilities by public entities. If the applicant or employee needs a reasonable accommodation in order to perform the essential functions of the position, the employer is obligated to provide the accommodation, unless doing so would constitute "an undue hardship or burden." The undue hardship determination is intended to be flexible, depending upon the facts of an individual case. In making that determination, the key factors to be considered are: a) the overall size of the employer's business, including the number of employees, the number and type of facilities, and the size of its budget or available assets; b) the nature of the employer's operation, including the composition and structure of the work force; and c) the nature and cost of the accommodation needed.

What are the program accessibility requirements of Title II?

Title II provides that no qualified individual shall, as a

result of a public entity's inaccessibility, be excluded from participation in, denied the benefits of, or be subjected to discrimination in the services, programs or activities of a public entity. The regulations impose different accessibility obligations depending upon the category in which the facility falls: existing facilities or new construction and alterations.

Existing facilities: A public entity must operate each service, program or activity, so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This principle is generally referred to as "programmatic accessibility". In essence it does not require that a public entity make every part of its existing facilities physically accessible, but instead requires that the programs and services which you administer be available to people with disabilities.

You are not required to make structural changes in existing facilities where other methods are as effective in achieving compliance. Examples of such alternative methods include alteration of existing facilities and reassignment of services to accessible buildings or sites. In choosing among alternative methods of making your services programmatically accessible, the alternative chosen needs to be no less effective in terms of affording the person privacy and dignity. In addition, in choosing among methods, the public entity needs to give priority consideration to those methods which are consistent with providing services in the most integrated setting, i.e., that method which causes the minimal amount of separation from individuals without disabilities.

Nor are you required to take any action that would result in a fundamental alteration in the nature of a service, individual program, or activity, or impose undue financial and administrative burdens. Where the entity believes that compliance would impose undue administrative and financial burdens, or would fundamentally alter the nature of the program, that decision must be made by the head of the public entity, and be reduced to writing. That written statement must include the basis for reaching that conclusion.

New Construction and Alterations: New construction and alterations that are commenced after January 26, 1992 must comply with physical accessibility standards.

Is carrying an individual into an inaccessible building an acceptable alternative method of providing access to a program?

The answer is almost always no. Carrying is permitted only in manifestly exceptional cases. That exception should not be

viewed as being acceptable except in the most limited, emergency situation. Even in those instances, carrying is only permissible if all personnel who participate in carrying an individual with a disability are formally instructed on the safest and least humiliating means of carrying a person.

What requirements does Title II impose with respect to communications?

A public entity is required to take appropriate steps to ensure that communications with members of the public with disabilities are as effective as communications with others. If the furnishing of appropriate aids and services is required in order for an individual with disability to have an equal opportunity to participate, the entity is required to furnish those aids and services. Where the public entity communicates by phone with recipients of its services, it must utilize Telecommunication Devices for the Deaf (TDD's) or some other equally effective communication device. In Massachusetts, a telephone relay system for non-emergency telephone calls already exists.

What about emergency communication services?

Telephone emergency services, including 911 services, must provide direct access to individuals who use TDD's and computer modems.

Does the ADA impose any training obligations on public entities?

While the statute does not impose any explicit training requirements on public entities, the legislative history of the ADA makes clear that there may be some instances in which it is necessary to provide training to public employees about disability. The example cited in the legislative history refers to the possible improper treatment of persons with epilepsy who have been inappropriately arrested and jailed because police officers had not received proper training in the recognition of and aid for seizures. Further mishandling of the person, it points out, could occur after an arrest if a person with epilepsy is deprived of needed medication, causing further seizures. Such discriminatory treatment could be avoided by proper training.

Can a public entity raise as a defense to a claim of discrimination under the ADA that the public entity did not intend to discriminate against the individual with a disability?

No, that is not an available defense. A key principle of the ADA is that the law addresses not only actions which were intentionally discriminatory, but also practices or policies which have a discriminatory effect. Although a policy may be completely well-intentioned, it violates the ADA if its effect is discriminatory. The statute prohibits a public entity from using "criteria or methods of administration" that deny a person access to an entity's services, programs or activities. The phrase "criteria or methods of administration" refers to official written policies as well as actual practices. It prohibits blatantly exclusionary policies and practices, as well as those policies or practices that may be neutral on their face but deny an individual an opportunity to participate.

Does the ADA require a public entity to conduct a self-evaluation?

Within one year of January 26, 1992, a public entity must evaluate its current services, policies and practices to examine the extent to which they do not conform to the requirements of the ADA. The self-evaluation process requires that the entity provide an opportunity for interested persons, including persons with disabilities, to participate in the process by submitting comments. If the entity has already complied with the self-evaluation process under §504, then it is only required to conduct a self-evaluation for any practices and policies not included in the prior self-evaluation.

Conclusion:

The above summary attempts to answer some of the most common questions that arise concerning the ADA. Agencies that have further questions are encouraged to contact the Disability Rights Project within the Civil Rights Division of the Office of the Attorney General. We will try to respond or refer you to other resources. By disseminating information on the requirements of this important new civil rights statute, we hope to be able to assist everyone in understanding and meeting their obligations under the Americans with Disabilities Act.

ENDNOTES

1/ 42 U.S.C. §12115.

2/ 42 U.S.C. §12132.

3/ 29 U.S.C. §794.

4/ For a discussion of Amendment 114, see Crane, "The Massachusetts Constitutional Amendment Prohibiting Discrimination on the Basis of Handicap: Its Meaning and Implementation" 16 SUFF.U.L.Rev. 49 (1982).

5/ 28 C.F.R. §35.104

6/ Id.

7/ 28 C.F.R. §35.149

8/ 35 C.F.R. §35.151

9/ H.R. Rep. No. 101-485(III) 101st Cong., 2nd Sess. 51 (1990).

10/ Id.

11/ 28 C.F.R. §35.105

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